Supreme Court, U. S.
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JOSEPH F. SPANIOL, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1730

COUNTY OF SANTA BARBARA,

Petitioner

vs.

BRIAN J. COLLINS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

COUNTY OF SANTA BARBARA,

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vs.

BRIAN J. COLLINS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The petitioner, COUNTY OF SANTA BARBARA, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, entered on December 10, 1979.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, unreported, appears in the Appendix. The Supreme Court of California denied a petition for hearing and ordered that the opinion of the Court of Appeal, certified for publication by that court, not be published. The Order of the Supreme Court of California appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, was entered on December 10, 1979. A timely petition for hearing in the Supreme Court of California was denied on February 14, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Are California fire and law enforcement personnel denied equal protection under the Fourteenth Amendment by a judicial rule that forecloses them from recovering damages in tort for personal injuries and death occurring while on duty?

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 23, 1976. Ralph E. Ginter an employee of the petitioner, was injured while on duty as a deputy sheriff. His injuries were caused by the negligence of the respondent in the operation of a motor vehicle. Deputy Ginter and his partner were parked in a patrol vehicle some 40 feet off the road to monitor traffic for possible traffic violations. The respondent failed to negotiate a curve and struck the parked vehicle in which the deputies were sitting. The injured employee filed a personal injury action in the Superior Court of California for the County of Santa Barbara against the respondent. The petitioner intervened in that action to recover workers' compensation benefits it had provided its employee. The underlying personal injury action of the injured employee was settled and the petitioner proceeded with its action to recover the

amount of the benefits it had provided. The respondent moved for summary judgment on the ground that the petitioner's action was barred by the "fireman's rule" and this motion was granted and the action dismissed.

The dismissal was upheld by the Court of Appeal of the State of California, Second Appellate District. That court held, in short, that the fireman's rule constituted a reasonable classification of equal protection of firemen and policemen as opposed to other persons damaged by negligence. The Court did not discuss in depth the constitutional issue, but concluded that the fireman's rule was "premised upon sound and reasonable public policy." See pp. 16-17 of the Appendix.

REASONS FOR GRANTING THE WRIT

A SUBSTANTIAL FEDERAL QUESTION WAS RAISED AND PASSED UPON IN THE HIGHEST STATE COURT

It is jurisdictional for this court that a federal question be raised and passed upon in the highest court. **Raley v. Ohio,** (1959) 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344; **Jenkins v. Georgia,** (1974) 418 U.S. 153; 94 S. Ct. 2750, 41 L. Ed. 2d 642.

In this case there has been a decision by the highest state court even though it was an intermediate appellate court. A timely petition for hearing in the California Supreme Court was submitted and denied. In that context, there has been a decision by the highest state court and

jurisdiction vests in this court. **Stratton v. Stratton** (1915) 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142; **Banks v. California,** (1969) 395 U.S. 708, 89 S. Ct. 1901, 23 L. Ed. 2d 653.

The opinion of the highest state court which is the subject of this petition shows that the federal question was raised and decided. See pp. 16-17 of the Appendix. While the discussion of the constitutional issue was less than adequate, it was clearly an issue before the Court and decided by it in reaching its decision.

THE OPINION OF THE CALIFORNIA COURT OF APPEAL IS STATE ACTION WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT

It is more commonplace for this court to review state statutes or local ordinances for constitutionality, or lack thereof, as opposed to judicial decisions. It is well settled, however, that a judgment of a state court is state action. **Cooper v. Aaron,** (1958) 358 U.S. 1, 78 S. Ct. 1399, 3 L. Ed. 2d 3.

Since the **Civil Rights Cases** (1883) 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly established in our constitutional law that the only action inhibited by the Fourteenth Amendment is action of the States. The Amendment provides no safeguards against merely private conduct however wrongful or discriminatory. This court has recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts may result in the denial of constitutional

rights even though the judicial proceedings may have been conducted with the highest standard of procedural due process. **Shelley v. Kraemer** (1948) 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; **Bridges v. California** (1941) 214 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192; **Barrows v. Jackson** (1953) 346 U.S. 249, 73 S. Ct. 1031, 76 L. Ed. 1586.

THE PETITIONER HAS STANDING AS AN EMPLOYER OF A LAW ENFORCEMENT OFFICER TO PRESENT THE CONSTITUTIONAL ISSUE

The petitioner has provided workers' compensation benefits for its injured employee and under California statutory law has a right to intervene in the plaintiff's case against a tort-feasor defendant to recover the amount of benefits provided. It may also maintain an independent action against the tort-feasor. California Labor Code § §3850-3854. The employer's cause of action is created by statute and unknown at common law. It is best thought of as a statutory action for indemnity to recover from a third person's tort. **State Compensation Insurance Fund v. Williams** (1974) 38 Cal. App. 3d 218, 112 Cal. Rptr. 226. Defenses available to the tort-feasor as against the injured employee plaintiff may be asserted against the employer. **Witt v. Jackson** (1961) 57 Cal. 2d 57, 17 Cal. Rptr. 369. In this case, the injured employee would be barred from recovery by the fireman's rule which also bars the petitioner. For the purposes of the issue presented, the petitioner as employer and the injured employee stand in the same

shoes. Since the petitioner is foreclosed to bring an action because of an unconstitutional common law rule, it has suffered a substantial injury and is within the class along with its employees whose constitutional rights are infringed upon. **Barrows v. Jackson, supra; Bode v. Barrett** (1953) 344 U.S. 583, 73 S. Ct. 468, 97 L. Ed. 517; **Jeffrey Mfg. Co. v. Blagg** (1915) 235 U.S. 571, 35 S. Ct. 167, 59 L.Ed. 364.

THE FIREMAN'S RULE DENIES THE PETITIONER EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT

The fireman's rule provides that negligence in causing a fire does not furnish a basis for liability to a professional fireman injured or killed while fighting the fire. It has been extended to policemen and precludes their recovery for injuries sustained in the line of duty and caused by the negligence of third parties. **Walters v. Sloan** (1977) 20 Cal. 3d 199, 142 Cal. Rptr. 152

A policeman or fireman should not be barred from recovering damages for injuries sustained in the line of duty as the result of another's negligence simply because the injuries arise out of a forseeable risk of his occupation.

Generally, a California employee who sustains injury arising out of and in the course of his employment because of the negligence of a third party tort-feasor, not his employer, may bring an action for damages against the tort-feasor, as though his injury were not work-connected. His right against the negligent third party is precisely the same as if the injury had occurred in a non-employment situtation. **Lamoreux v. San Diego & Arizona Eastern**

Railway Company (1957) 48 Cal. 2d 617, 311 Pac. 2d 1.

Applying this general rule, the California courts have allowed injured workers to bring tort actions against third parties for virtually all negligently inflicted injuries. Highway workers may recover for injuries sustained as a result of a third party's negligent driving. **Scott v. City and County of San Francisco** (1949) 91 Cal. App. 2d 887, 206 Pac. 2d 45. A subcontractor's employees may recover for injuries on a construction job caused by the negligence of the general contractor or the owner. **Woodcock v. Fontana Scaffolding & Equipment Company** (1968) 69 Cal. 2d 453, 72 Cal. Rptr. 217. A mechanic may recover for job-related injuries caused by negligence of a customer of his agent. **Houseright v. Pacific Far East Line, Co.** (1964) 229 Cal. App. 2d 259, 40 Cal. Rptr. 208.

Firemen and policemen have found it more difficult than other employees to recover damages for negligently inflicted injuries incurred in the line of duty. The most probable explanation for this "second class" treatment lies in early common law property doctrine which distinguished the duties owed by a landowner to "invitees" and to "licensees". See 2 Harper & James, The Law of Torts (1956), pp 1501-1505. Whatever historical basis the rule had, it has no application in modern day society, when policemen and firemen are called to protect life and property and may sustain injury or death in a factual context bearing no relation to the historical "licensee" label. Indeed, the instant case, where petitioner's employee was injured while seated in a patrol car parked some

distance from the travelled portion of the roadway, cannot be supported by the historical duty owed to a "licensee."

As stated in a leading test: "All officers, inspectors, as well as policemen and firemen, derive their right of entry from law and not from either the consent or the invitation of the occupier. The protection accorded to such a visitor should therefore be prescribed by law to fit the circumstances of the visit, and not governed blindly by a false analogy to invitational consent." 2 Harper & James, **supra,** p. 1505.

Supporters of the rule argue that the fireman is paid to put out fires and the policeman to make arrests. No tort claim can be based upon damages caused by the very risk that those individuals are paid to encounter and trained to cope with. Under this analysis, an employee would routinely be foreclosed from bringing a tort action whenever an injury caused by a negligent tort-feasor could be characterized as a normal, if not inherent, risk of employment. As has been pointed out, California permits highway workers, construction workers, and others whose employment has significant risk of injury, to recover for job-related injury caused by the negligence of a third party.

In support of this rule, it is argued that the rule spreads the risk of the fireman's or policeman's injuries from the negligent tort-feasor to the taxpaying public. In fact, the injured fire or law enforcement officer cannot recover tort damages from the public at large but is precluded from recovering them at all. All other injured workers are entitled to recover workers' compensation

benefits as well as their additional tort damages from third party tort-feasors. The rule in practice requires the injured fireman or policeman to shoulder a loss which other employees are not required to bear.

The petitioner, as the employer, ordinarily may recover the amount of workers' compensation benefits it provides to its employees injured by the negligence of third parties. The only exception is for benefits provided to fire and law enforcement employees.

The spreading-the-risk rationale is specious since liability insurance is readily available and utilized by those either occupying or dealing with real and personal property. There is no compelling merit to the argument that applying ordinary priniciples of negligence to a tort-feasor in this context will significantly reduce the prevalence of insurance due to increased cost or even substantially increase the cost.

Petitioner is well aware that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. **McDonald v. Board of Election Commissioners** (1969) 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739.

When "the interest at stake" is of great importance to the individual, "[a]ny fair balancing" of that interest "as opposed to what may be nothing more than a hypothetical justification, requires rejection of the argument of administrative convenience . . ." **Hampton v. Mow Sun Wong** (1976) 426 U.S. 88, 115-16, 96 S. Ct. 1895, 48 L. Ed. 2d 495.

It must be recognized that the rule petitioner attacks

is common law and not a statute or ordinance. State practice, while it may be state law, cannot supplant the constitutional guarantees. This court in **New York Times Co. v. Sullivan** (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 showed no hesitation in subjecting common law defamation rules to First Amendment scrutiny. The nature of the right in this case directs an inquiry into California's scheme of common law remedies. The question presented is whether state law which deprives fire and law enforcement employees of a right belonging to all other public employees meets the equal protection requirements of the Fourteenth Amendment.

In the instant case, it is respectfully submitted that the operation of the fireman's rule denies equal protection of the laws to a class of employees most deserving of fair and reasonable treatment. Policemen and firemen should not and must not be "second class" citizens in relation to other public employees.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California.

Respectfully submitted,

PETER J. SAMUELSON
FRED P. LYNCH
Counsel for Petitioner

APPENDIX

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

RALPH E. GINTER
Plaintiff

v.

BRIAN J. COLLINS
Defendant and Respondent,
COUNTY OF SANTA BARBARA,
Intervener and Appellant.

2 Civil No. 56689
(Super. Ct. No. SM 22362)

COURT OF APPEAL-SECOND DIST.
FILED
DEC 10, 1979
CLAY ROBBINS JR. CLERK
Deputy Clerk

APPEAL from an order of the Superior Court of Santa Barbara County. Robert L. Trapp, Judge. Affirmed.

Fred P. Lynch, Samuelson & Oksner and Peter J. Samuelson, for Intervener and Appellant.

Hoge, Fenton, Jones & Appel, Inc., and Raymond E. Mattison, for Defendant and Respondent.

Plaintiff in intervention County of Santa Barbara appeals from an order of dismissal following the granting of a motion for summary judgment by the defendant and respondent Collins. The complaint alleged that plaintiff was a passenger in a parked motor vehicle and that defendant negligently drove his motor vehicle, causing it to collide with the vehicle in which plaintiff was seated, thereby proximately causing injury and damage to the plaintiff. The appellant county filed the complaint in intervention under the provisions of Labor Code section 3857 as the employer of the plaintiff and thus subrogated to his rights to the extent of its obligation to pay workers' compensation benefits to the plaintiff.

The basis for the motion for summary judgment, and its subsequent granting by the trial court, was the "fireman's rule." This priniciple precludes recovery by professional firemen and policemen for damage caused to them by the negligence of others in the creation of the very occasion for their engagement as firemen or police officers. (**Walters v. Sloan,** 20 Cal. 3d 199.) Relying upon the **Walters** decision, the trial court concluded that the "fireman's rule" was applicable to the facts and granted the motion for summary judgment. An order of dismissal was filed, and this appeal ensued.[1]

The appellant raises three issues on appeal:

1. A triable issue of fact exists, and therefore it was reversible error to grant the motion for summary judgment.

1 The clerk's transcript does not reveal that a judgment was signed and entered. However, the parties appear to have treated the order of dismissal as a judgment. (**Haumeder v. Lipsett,** 90 Cal. App. 2d 167.)

2. The trial court committed reversible error in applying the "fireman's rule" to the facts of the instant case.

3. The "fireman's rule" is contrary to general principles of tort law and is unconstitutional under the equal protection provisions of the California and United States Constitutions.

The plaintiff was employed by the County of Santa Barbara as a deputy sheriff. It is undisputed that on the night of the accident he was on duty. Initially, he and his partner were dispatched to the scene of a party due to a complaint of neighboring property owners concerning the party. After investigation, it was determined that there was no basis for criminal citation. Following the investigation, the plaintiff and his partner proceeded to another location where their vehicle was parked westbound, some 40 feet off the road to monitor traffic for possible vehicle violations. One vehicle was stopped for erratic driving and to check for possible intoxication of the driver, but he was released. The police vehicle returned to its original parked position and was at that location when a vehicle driven by the respondent failed to negotiate a turn and struck the police vehicle, injuring the plaintiff. That driving was characterized by the plaintiff himself as "traveling at excessive speed" and "failing to execute a curve in the road." While there is evidence that the plaintiff and his partner positioned themselves to check guests departing the party in vehicles for intoxication, such evidence is not necessary to support the trial court's order of dismissal. It

is clear that their parked position was dictated by their intent to check driving conduct at that particular portion of the roadway for possible vehicular violations.

In the appellate review following the granting of a summary judgment, the court must determine that no factual issues exist to be resolved in the trial court, and that the matter was disposed of correctly as a matter of law. **(Schrimscher v. Bryson,** 58 Cal. App. 3d 660, 663.) Contrary to appellant's contention, the instant record meets this test. It is uncontradicted that the plaintiff was on duty and had placed himself in a parked position for vehicular surveillance. The accident resulting in injury to the plaintiff was caused by the negligence of a person whose driving he had positioned himself to scrutinize. While it is true that the plaintiff was not called to the scene, the trial court was correct in concluding that no fine distinctions are to be drawn in applying the public policy behind the rule. Where a police officer has voluntarily positioned himself to survey moving vehicular violations, and he thereby exposes himself to harm from the very driving conduct he is seeking to monitor, the policy behind the rule compels the conclusion that he cannot seek tort recovery for that negligent driving. He has voluntarily confronted the risk for compensation, and public policy requires that he look elsewhere to be compensated for any harm sustained in the fulfillment of his duties, i.e., workers' compensation benefits. **(Walters v. Sloan** 20 Cal. 3d 199, 205.)

McAllister v. Cummings, 191 Cal. App 2d 1 and **Witt v. Jackson,** 57 Cal. 2d 57, are not in conflict with the conclusions reached here. Each of those cases dealt with the conduct of a negligent driver other than a person who was the object of the officer's attention. In each instance the risk of such driving on the part of a third person was not a part of the "occasion for the officer's engagement" and was not one voluntarily confronted. (See **Walters v. Sloan, supra,** 20 Cal. 3d at p. 202, fn. 2.) No third person was involved in the instant case, and the trial court did not err in applying the "fireman's rule" to the complaint in intervention.

Appellant argues that the "fireman's rule" created an unjustified exception to the general principle that an individual must exercise reasonable care under the circumstances, and, therefore, is in direct conflict with the constitutional guarantee of equal protection of the laws. The reasonable classification of equal protection of firemen and policemen as opposed to other persons damaged by negligence was thoroughly considered in **Walters** by the Supreme Court; it reaffirmed the "fireman's rule," noting it was born nearly 100 years ago, earned nearly unanimous approval, and it placed its stamp of approval on the rationale and public policy supporting it. While the court did not discuss the issue as a constitutional one, its statements and reasoning leave no doubt that it was declaring a concept consistent with other cases of basic tort doctrine and premised upon sound and reasonable

public policy. **(Walters, supra,** 20 Cal. 3d at pp. 204, 205.) In the light of this, there is no merit to the constitutional challenge.

The order of dismissal is affirmed. Respondent to recover costs on appeal.

CERTIFIED FOR PUBLICATION

KAUFMANN, J*

I concur:

LILLIE, Acting P.J.

*Assigned by the Chairperson of the Judicial Council.

I respectfully dissent.

If, hypothetically, defendant Brian J. Collins (hereinafter Collins) had struck and damaged a stationary inanimate speed limit sign owned by the County of Santa Barbara (hereinafter County), there is no doubt that the County could sue Collins for that damage.

If, hypothetically, the County's patrol car was parked off of the road and left unattended while the officers were having a coffee and donut break at a Winchell's stand and defendant Collins left the road and crashed into the patrol car, there is no doubt that the County could sue Collins for the damage to the unattended vehicle.

I have extreme difficulty applying the "fireman's rule" relieving Collins of civil liability to either Officer Ralph E. Ginter (hereinafter Ginter) or the County merely because Officer Ginter climbed into his patrol car legally parked 40 feet off of the roadway and was watching the road for traffic violators when he, out of the blue, was clobbered by a motorist (Collins).

As pointed out in **Walters v. Sloan** (1977) 20 Cal. 3d 199, "the fireman's rule is based on a principle as fundamental to our law today as it was centuries ago. The principle is not unique to landowner cases but it is applicable to our entire system of justice — one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby." (20 Cal. 3d at p. 204.)

In my view the facts of the case at bench do not fall within the ambit of the underlying fundamental principle upon which the fireman's rule is based as described in **Walters.** Officer Ginter was not engaged in the hazardous activity of being in hot pursuit of a speeding motorist at the

time of the collision. He was legally parked in a stationary position well off the travel portion of the roadway. I cannot see how Officer Ginter was "voluntarily undertaking the hazard causing [the] injury" (ibid.) under those circumstances any more than any other motorist not engaged in law enforcement who may have parked his or her car at the same location 40 feet off of the highway.

In my opinion such a strained application of the fireman's rule to the facts of the instant case renders all patrol officers, who are on duty but stopped well off of the highway in their patrol cars, "fair game" for speeders and drunk drivers since, by application of the rule, they can escape personal civil liability for their tortious acts and merely pass the buck for the injuries and damage which they cause on to the tax-paying public. I do not believe either California case law or the rationale behind the fireman's rule intended such a result. Nor would application of the rule under the facts of the case at bench be in the best interest of sound public policy.

I would reverse the order of dismissal.

HANSON J.

Order Due
March 7, 1980

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2d Distric, Division 1, Civil No. 56689

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GINTER, Plaintiff

V.

COLLINS, Defendant and Respondent;
COUNTY OF SANTA BARBARA,
Intervenor and Appellant.

SUPREME COURT
FILED
FEB 14 1980
G.E. DISHEL, Clerk
(J. Rossi) Deput

Petition of Intervenor and Appellant for hearing DENIED.

Tobriner, J., and Clark, J., are of the opinion that the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled cause filed December 10, 1979, and appears at 99 Cal. App. 3d 537. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.)

Bird
Chief Justice

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 610 North Bush, Santa Ana, California 92701.

On April 28, 1980, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of 4 sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Raymond E. Mattison, Esq.
Hoge, Fenton, Jones, &
Appel, Inc.
1043 Pacific Street
San Luis Obispo, California
93401

California Supreme Court
3580 Wilshire Blvd.,
Room 213
Los Angeles, California
90010

Clerk, Court of Appeal
2nd Appellate District
3580 Wilshire Blvd., 3rd Floor
Los Angeles, CA 90010

Clerk of the Superior Court
County of Santa Barbara
Anapamu and Anacapa Streets
Santa Barbara, CA 93101

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on April 28, 1980, at Santa Ana, California.

JACK GALLAGHER